LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 28 1962
JOHN F. DAVIS, CLERK

No. 469

In The Supreme Court of the United States

OCTOBER TERM 1962

UNITED STATES OF AMERICA
FOR THE USE AND BENEFIT OF
HENRY J. LARKIN, d/b/a LARKIN COMPANY
Plaintiff Appellant,

v.

PLATT CONTRACTING CO. INC.
CONTINENTAL CASUALTY COMPANY and
AMERICAN EMPLOYERS INSURANCE COMPANY
Defendant, Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

HENRY J. LARKIN, *pro se*
Plainfield, Conn.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute Involved	3
Statement	4
Reasons for granting the writ	8
Conclusion	8
Appendix A	9
Appendix B	11

TABLE OF CITATIONS

CASES

Barber-Greene Co. v. M. E. Dollard, Jr., Inc., 239 App. Div. 655,269 N.Y.S.211, affirmed by the Court of Appeals 267, N.Y. 545, 196 N.E. 571.

13 C.J. 279.

Continental Cas. Co. v. Schaefer, C. A. Wash 1949, 173 F2d 5. Certiorari denied 69 S.Ct.1517 337 U.S. 940,93 L. Ed. 1745, Rehearing denied 70 S.Ct. 35,338 U.S. 841, 94 L.Ed. 514. Certiorari denied 70 S.Ct.63,338 U.S. 820, 94 L.Ed. 497.

Coffee v. U.S. for Use and Benefit of Gordon, C.C.A. Fla 1946, 157 F 2nd 968.

Iselin v. United States, 271 U.S. 136,46 Sup.Ct. 458,459, 70 L. Ed. 872.

McWaters and Bartlett v. U.S. for Use and Benefit of Wilson. C.A. Wyo.1959, 272 F 2d 291.

Poel v. Brunswick-Balke-Collender Co. of New York, 216 N.Y. 310, 110 N.E. 619.

Ross Eng. Co. v. Pace C.C.A. Va. 1946, 153 F2d 35.

Schenectady Stove Company v. Holbrook, 101 N.Y. 45, 4 N.E. 4.

U.S. for Use and Benefit of Magnolia and Petroleum Co. v. Core and Planche D.C. La 1945, 58F. Supp. 607 Modified on other grounds 153 F2d 527.
U.S. for Benefit and on Behalf of Sherman v. Carter Cal. 1957. 77S Ct. 793, 353 U.S. 210 IL. Ed. 2d 776.
Wernin, Legal Cases for Contractors, Architects and Engineers, Chapter 31, pages 277-290.
Wittwer v, Hurwitz, 216 N.Y. 259, 110 N.E. 433.
Wunderlich Contracting Co. v. United States, 240 F2d 201.

In The Supreme Court of the United States

OCTOBER TERM 1962

No.

UNITED STATES OF AMERICA
FOR THE USE AND BENEFIT OF
HENRY J. LARKIN, d/b/a LARKIN COMPANY
Plaintiff Appellant,

v.

PLATT CONTRACTING CO. INC.
CONTINENTAL CASUALTY COMPANY and
AMERICAN EMPLOYERS INSURANCE COMPANY
Defendant, Appellee.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

HENRY J. LARKIN, *pro se*
Plainfield, Conn.

United States of America for the Use and Benefit of Henry J. Larkin d/b/a Larkin Company, petitions for a Writ of Certiorari to review the judgment of the Court of Appeals for the First Circuit entered in this case on July 5, 1962.

OPINION BELOW

The court of appeals rendered an opinion. Its judgment is set forth in Appendix A.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court below erred in forcing on the plaintiff an offer in compromise to accept less than the amount claimed due made in writing more than three years before trial that was never accepted, answered or acknowledged in any way, shape or manner, and was withdrawn by the plaintiff one week before losing his rights and entering suit.

2. Is the plaintiff appellant entitled to be paid for labor and material furnished and installed over and above the sub-contract and change orders.

3. Is the plaintiff appellant to be backcharged for exclusions set forth in his sub-contract.

4. Is the plaintiff appellant to be charged for payment on another sub-contract involving a supplementary agreement that was defaulted by the defendant.

5. Is the plaintiff appellant to be deprived of a chance to put into evidence a fair value or a quantum meruit claim when the sub-contract and change orders were so extensive and radical that the plaintiff appellant was compelled to perform a sub-contract that was materially different from the one he executed and was not bound by the adjusted sub-contract price.

6. Is the plaintiff appellant to be deprived of the right to have an attorney fill in offers of proof when the attorney entered the case on the fourth day of trial, that was missed by the plaintiff appellant in the first three days of trial putting on his own case when the District Court Judge had given the attorney permission to do so.

7. Is the plaintiff appellant to be charged for alleged payments made by the Surety without proof.

8. Is the law to be liberally construed.

9. Is the plaintiff appellant entitled to interest from date of acknowledged demand.

10. Is the plaintiff appellant entitled to costs.

11. Does the evidence require as a matter of law judgment for the plaintiff appellant in the amount claimed.

12. Is the question properly presented on the record to require judgment for the plaintiff appellant.

13. Is the state of the law and evidence such that the court erred in not entering a verdict for the plaintiff appellant in the amount claimed.

14. Did the court have the right to deny the plaintiff appellant a jury trail.

15. Did the court err in granting the motion to confirm the master's report.

16 Did the court err as a matter of law in refusing to hold that the appellant's objections to the Master's report were proper.

17. Did the court err as a matter of law in refusing to hold that the appellant's motion to recommit was proper.

18. Did the court err as a matter of law in refusing to hold the appellant's motion to consolidate was proper.

19. Did the court err in denying the relief demanded for in the amended complaint herein.

STATUTE INVOLVED

U.S.C. Title 40. Section 270a, b, c, d, provides for payment of persons furnishing labor and material.

§ 270b. Same; rights of persons furnishing labor or material

(a). Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who *has not* been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institutions of such suit and to prosecute said action to final execution and judgment for the *sum or sums justly due him*: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material *for which such claim is made*, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the Name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit. Aug. 24, 1935, c. 642, § 2, 49 Stat. 794.

STATEMENT OF THE CASE

This is an appeal from the U.S. First Circuit Court of Appeals judgement in favor of the appellant brought under U.S. Code, Title 40, Section 270b: to recover increased costs for furnishing and installing labor and material in a United States of America owned Air Force Research Center due to extensive and radical change orders with the result that the appellant was compelled to perform on a sub contract that was materially different from the one that he executed.

The first cause of action is on the sub-contract, change orders and additional labor and material furnished and installed not covered by sub-contract or change orders, covered by the original complaint.

The second cause of action that the lower court refused to hear, is a charge for a fair value of all the work done without regard to the sub-contract or change orders and as covered by the amended complaint.

THE FACTS

On December 13, 1954, Platt Contracting Co., Inc., hereinafter referred to as Platt, entered into a contract with the United States of America for the construction of Building F, at the Bedford Research Center at Bedford, Massachusetts for an agreed price of $1,323,000.00. Pursuant to the terms of the contract, Platt furnished two payment bonds, each in the sum of $254,600, the sureties being the defendants, Continental Casualty Company and American Employers Insurance Company. Later changes were made in the work and the contract price of the prime contract was increased to $1,662,968.21.

On February 17, 1955, Larkin entered into a subcontract with Platt under which Larkin was to perform part of the work for an agreed price of $213,000.00. Appellant contends that the change orders effected his part of the work so as to increase the cost of performing the same in the amount of $113,232.90 and that he was required by Platt to perform additional work of the value of $4,665.50 and that he suffered damages in the amount of $3,060.00 as a results of delays by virtue of a stop order issued by the Air Force and extended to Larkin by Platt so that he was entitled to recover the difference between $333,958.40, the total of the above claims, less $222,522.00 paid on account, leaving a balance of $111,436.40 unpaid for the work performed by him.

All of the work called for by the prime contract was completed and accepted by the government and Platt was paid in full, on May 24, 1957.

Shortly thereafter Platt laid off all their help, closed their office and stopped doing business leaving appellant sub-contractor unpaid among others. The principal officers left this State at this time. This action is primarily against the apellee surety.

On May 18, 1957, Larkin demanded payment of the balance due him for the performance of the contract and the parties being unable to come to an agreement as to the amount due Larkin, Larkin, on May 21, 1958 brought this action to recover an alleged balance of $111,436.45 due on the contract. The matter was referred to a Master, who after hearings recommended a verdict in favor of Larkin in the amount of $6,051.64, with interest from May 21, 1958, when the action was instituted.

The basic of this determination is set forth in the Master's report. The details of plaintiff's claim as stated in the report has already been set forth. The defendants claim was that the balance remaining unpaid to Larkin, as of May 18, 1957 amounted to $76,217.47 before deductions for back charges. The difference between the adjusted contract price as set forth by defendants and the amount claimed by Larkin amounted to $23,354.08.

In the letter dated May 23, 1957, sent by Platt to Larkin in which he stated that the balance remaining unpaid to Larkin was $76,217.47, before any back charges were made and deducted therefrom the sum of $14,135.56 as back charges, thus reducing the balance due Larkin to $62,018.91. The letter also listed four claims in the amount of $10,002.49 and the amount of this claim would increase the balance to $72,084.40.

On August 20, 1957, Platt addressed a letter to the attorney for the surety companies, which showed a balance of $62,081.91 and credited Larkin with $325.10 for gas valves and deducted $9,699.73, the amount paid to one of Larkin's subcontractors. This reflected a balance of $52,716.28. By the same letter Platt gave Larkin credit for two claims in the amount of $4,573.95 so that the adjusted balance due Larkin was fixed at $57,290.23.

On January 20, 1958, Larkin sent a letter to John Blakeney, the attorney for the Continental Casualty Company, in which he agreed to the settlement set forth in Platt's letter of May 23, 1957 and as supplemented by Platt's letter under date of August 20, 1957, of which he had received a copy, with one exception, the payment of $11,864.85 to the amount paid in a settlement of a claim. This modified offer by Larkin was never accepted and in fact was subsequently withdrawn. It is common knowledge that contractors will generally accept a lesser amount than that claimed due to avoid the cost of litigation. Despite the fact that the counter offer by Larkin was never accepted, the Master accepted, the amount offered in settlement as the basis of the amount due Larkin. The Master also disregarded the amount of $4,573.95, that Platt admitted to be due Larkin for extra work, the basis for such rejection being: "I find that by his failure to cooperate in rendering adequate documentary support to these claims so that Platt could collect for them from the United States Army under its contracts, as extras, that he is estopped from asserting them as a claim at this late juncture." The Master was clearly in error in coming to this conclusion because: (1) Plaintiff claims he did cooperate with Platt in pressing his claim against the government and (2) that his cooperation in pressing Platt's claim is not material to

his right to recover under the subcontract. The fact that the work in question was not covered by the subcontract is the only matter involved in the issue and the fact that such work was included in the prime contract does not bar the right of plaintiff to recover under the subcontract.

Larkin objected to the allowance of $11,864.85 paid by Platt to Larkin's subcontractor on another sub-contract. At that time there was a balance of $59,000 due Larkin on that other sub-contract. On July 28, 1955, Larkin and Platt entered into an agreement whereby Larkin agreed to pay Platt the above sum of $11,864.85, provided that Platt paid the same. This agreement also provided. "*Platt, however, shall cooperate with Larkin in proving his said claims, and in effecting collection thereof, and payment thereof against the New Bedford Housing Authority.* * *"

Under the terms of the said contract, Larkin could make no direct claim against the Housing Authority. The work in question was considered extra work not called for by the prime contract so the obligation under the above mentioned agreement between Larkin and Platt required Platt to institute and prosecute a suit for said extra work against the Housing Authority and if he obtained a recovery to turn same over to Larkin. Platt instituted the suit but failed to proceed with the litigation. Since Platt failed to proceed with his obligations under the contract, there is no reason why Larkin should be held liable for his part of it. It will be noted that the Master denied Larkin credit for $4,573.95 that Platt admitted was due Larkin, holding he was estopped from making such a claim because Platt contended that Larkin failed to cooperate with Platt in prosecuting such claim against the government. It is paradoxical that the court allowed a backcharge of $11,864.85 against Larkin in spite of the fact that Platt failed to cooperate in prosecuting claim of Larkin's on the other sub-contract.

Moreover, Larkin credited Platt with the $11,864.85 on the balance due him on the other sub-contract and in the present action, the Master allowed Platt's sureties to charge-back the same amount on the present paid so that the Master is making Larkin pay two times for the amount paid to Larkin's subcontractors on another sub-contract.

The Master refused to allowed Larkin to put this evidence in on redirect examination after it was introduced by appellee Surety when appellant was on cross examination.

The subcontract provided: "Not included by this subcontractor: Excavation; Backfilling; Pumping; Concrete or masonry mats or foundations; drainage structures; painting or secondary electrical circuits." Despite this provision of the contract, the Master allowed defendants back charges in the amount of $14,135.56 for items of excavating, backfilling, masonry and carpentry not covered by subcontract. Plaintiff admits that the amount $309.10 was covered by the subcontract.

REASONS FOR GRANTING THE WRIT

1. The court below clearly erred in forcing on the plaintiff an offer in compromise to accept less than the amount claimed due, made in writing more than 3 years before trial that was never accepted, answered or acknowledged in any way shape or manner and was withdrawn by the plaintiff one week before losing his rights and entering suit.

2. The District Court below erred in refusing to allow the plaintiff to put in evidence the labor and material furnished and installed and further refused to allow any of the amount claimed for it, that was confirmed by the Appellate Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY J. LARKIN, *pro se*
Plaintiff Appellant

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5961.

UNITED STATES OF AMERICA
FOR THE USE AND BENEFIT OF
HENRY J. LARKIN, d b a LARKIN COMPANY
PLAINTIFF, APPELLANT

v.

PLATT CONTRACTING CO., INC.,
CONTINENTAL CASUALTY COMPANY and
AMERICAN EMPLOYERS INSURANCE COMPANY
DEFENDANTS, APPELLEES

Appeal from the United States District Court
for the District of Massachusetts

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Henry J. Larkin on brief pro se.

John W. Bowdoy and *Skeheny & Flaherty* on brief for Platt Contracting Co. Inc., Continental Casualty Company and American Employers Insurance Company, appellees.

OPINION OF THE COURT
July 5, 1962

PER CURIAM. Appellant Larkin, a sub-contractor, filed a complaint under the Miller Act, 40 U.S.C.A. §§270a-d, in May 1958, when he was represented by counsel, against appellees Platt Contracting Company, a principal contractor, and its sureties, seeking a balance allegedly due him in the amount of $111,436.40. Subsequently, appearing pro se, he filed a motion to amend, requesting the "fair value for work done" in the net amount of $536,873.85, which motion the court allowed. He also filed a belated jury claim, which was denied. The case was referred to a master, who found for Larkin in the amount of $6,051.64. Larkin's objections to the master's report were overruled, the report was confirmed, and judgment was entered thereon, from which he now appeals.

At the threshhold of the appeal is the question whether the master erred, as matter of law, in interpreting a letter from Larkin to Platt as an acceptance of the correctness of an accounting rather than an offer of compromise. On May 23, 1957 Platt wrote Larkin respecting "you[r] claim [of]

a balance due of $111,436.40. Your figures are incorrect in practically every particular. We list, herewith, an analysis of your account as it stands." There followed a detailed statement of account. So far as Platt was concerned this was clearly stated as what it considered to be due, and not in any way as a compromise suggestion. On January 20, 1958 Larkin wrote to Platt's and the surety company's counsel, "We have decided to accept a settlement based on Platt's letter to us of May 23, 1957 . . . with one exception." There followed a discussion of one item in Platt's letter of May 23, which was a payment made by Platt to an alleged creditor of Larkin's. Larkin objected that this had been paid "before the other contract was settled and was not a payment received by us." Larkin contends his undertaking to accept this "settlement" was in the nature of a compromise offer. The master treated it as an admission that Platt's accounting was correct except as to the one rejected matter.

The word "settlement," sometimes a word of art in legal circles as denoting a compromise, has other well-recognized meanings. Accounts are "settled." When all obligations of both parties under a contract have been finally disposed of, it is common to speak of the contract as being "settled." Indeed, Larkin used the word in this manner in the second quoted part of his letter. The master was warranted in finding that his earlier use of that word was in the sense of an acceptance of figures as distinguished from a proposal of compromise.

We have reviewed the master's report in the light of the testimony and exhibits. We find no error. Larkin's claim to recover for all work and materials on the basis of a *quantum meruit* in disregard of the contract is contrary to established principles. *Jefferson Construction Co.* v. *United States*, 1 Cir., 1960, 283 F.2d 265, *cert. den.* 365 U.S. 835.

Judgment will be entered affirming the judgment of the District Court.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5961.

UNITED STATES OF AMERICA
FOR THE USE AND BENEFIT OF
HENRY J. LARKIN, d/b/a LARKIN COMPANY
PLAINTIFF, APPELLANT

v.

PLATT CONTRACTING CO., INC., ET AL
DEFENDANTS, APPELLEES

JUDGMENT

July 5, 1962

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

ROBERT A. STINCHFIELD
Clerk